Supreme Court, U.S.
FILED

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No. 95-

SUPREME COURT OF THE UNITED STATES

October Term, 1995

DONALD L. PRUITT and
DENNIS L. PRUITT,

Petitioners,

v.

HOWARD COUNTY SHERIFF'S DEPARTMENT, MICHAEL A. CHIUCHIOLO, SHERIFF OF HOWARD COUNTY, MARYLAND, and HERBERT STONESIFER,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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62pp

QUESTION PRESENTED FOR REVIEW

1. Whether the court of appeals denied the Pruitts fair play and due process of law by affirming on the ground that summary judgment was justified a district court judgment dismissing under Fed. R. Civ. P. 12(b)(6) for failure to state a claim the Pruitts's action under 42 U.S.C., Title VII and Secs. 1981 and 1993, alleging they were discriminatorily discharged because of their race (white) and gender (male) from their former long term employment in supervisory capacities as members of the Howard County Sheriff's Department, the district court having decided the case solely on the Rule 12(b)(6) basis and no issue regarding summary judgment having been presented, briefed or argued by the parties on appeal.

LIST OF PARTIES

The caption of this case contains the names of all parties to the proceeding in the United States Court of Appeals for the Fourth Circuit, whose judgment is sought to be reviewed.

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No. 95-

SUPREME COURT OF THE UNITED STATES

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DONALD L. PRUITT and
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v.

HOWARD COUNTY SHERIFF'S DEPARTMENT, MICHAEL A. CHIUCHIOLO, SHERIFF OF HOWARD COUNTY, MARYLAND, and HERBERT STONESIFER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Donald L. Pruitt and Dennis L. Pruitt ("the Pruitts"), the petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in a cause there entitled Donald L. Pruitt;

Dennis L. Pruitt, Plaintiffs-Appellants, v. Howard County Sheriff's Department; Michael A. Chiuchiolo, Sheriff, Howard County; Herbert Stonesifer, Defendants-Appellees, No. 95-1193, affirming a judgment of the United States District Court for the District of Maryland, at Baltimore, which adopted a recommendation of its chief magistrate judge and dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim the Pruitts' action brought under 42 U.S.C., Title VII, and under 42 U.S.C., Secs. 1981 and 1983, alleging that they were discharged from their employment as supervisory members of the Department by respondents, the Howard County (Maryland) Sheriff's Department, Michael L. Chiuchiolo, Sheriff of Howard County, and Herbert Stonesifer (respondent Chiuchiolo's predecessor as sheriff) (collectively "the Department") based on their race

(white) and sex (male) (rather than on any alleged "Nazi-like" conduct on their part, as claimed by the Department, in which other members of the Department, including then Sheriff Stonesifer, also participated, but were not punished).

OPINIONS BELOW

The opinions below are not published. Copies are appended hereto. See, infra: App. 1 for the unpublished per curiam opinion of the court of appeals, filed January 31, 1996 (and corrected by order filed February 12, 1996, see App. 19); App. 20 for the district court's Memorandum filed December 22, 1994; App. 29 for the district courts order of the same date; and App. 31 for the Report and Recommendation of the district court's chief magistrate judge.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit

was entered on January 31, 1996 (and corrected on February 12, 1996). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., Amend. V, provides, in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

42 U.S.C., Sec. 1981, provided, prior to November 21, 1991, as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue,be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

By Sec. 101 of the Civil Rights act of 1991, Pub. Law No. 102-166, 105 Stat. 1071, 42 U.S.C., Sec. 1981, was amended

effective November 21, 1991 by adding thereto the following provision:

> "(b) Definition"
>
> "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

42 U.S.C., Sec. 1983, provides in pertinent part as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United states or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

42 U.S.C., Sec. 2000e-2, provides in pertinent part as follows:

> "(a) It shall be as unlawful employment practice for an employer-

> (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . ."

STATEMENT OF THE CASE

Federal jurisdiction in the United States District Court for the District of Maryland, the court of first instance in these two consolidated civil actions brought by the Pruitts, white, male twin brothers who alleged discriminatory race and gender based termination of their former employment by the Department as sheriff's deputies occupying supervisory positions and who sought monetary damages and equitable and other relief under Title VII of the Civil Rights Act of 1964 (42 U.S.C., Sec. 2000e et seq.) and under 42 U.S.C., Secs. 1981 and 1983, was conferred upon that court by 42 U.S.C., Sec. 2000e-5(f)(3), and 28 U.S.C., Sec. 1343(a)(3) and (4).

The Pruitts, proceeding pro se initiated these cases on December 18, 1992 by filling out and filing, separately, forms for civil rights actions furnished them by the district court clerk, On March 8, 1993 the Department filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6), or in the alternative for summary judgment, to which the Pruitts responded on April 29, 1993. On October 18, 1993 the district court denied the motion, without prejudice to its being renewed, and granted the Pruitts leave to file an amended complaint. The Pruitts did so, through counsel, on November 15, 1993. Thereafter the Department again filed essentially the same motion to dismiss or, alternatively, for summary judgment, the Pruitts responded and, on May 18, 1994, the cases were consolidated and referred to the district court's chief

magistrate judge for hearing, proposed findings of fact and recommendations as to disposition of pretrial matters. The report and recommendations were filed, without any hearing having been held, on October 31, 1994. Dismissal under Rule 12(b)(6), for failure to state a claim, was recommended. The Pruitts timely filed objections. On December 22, 1994, the district judge, again without a hearing, adopted the magistrate judge's recommendation, granted the Rule 12(b)(6) motion, dismissed the Pruitts' complaint and closed the two consolidated cases. Neither the magistrate judge nor the district judge addressed the alternative summary judgment aspect of the Department's motion or made any ruling with respect thereto. Nor was any material independent of the pleadings, such as affidavits or other factual submissions, filed by either side in

support of or in opposition to the alternative summary judgment request. The case was disposed of on the pleadings and motion papers alone.

The pleadings (the amended complaint) alleged in part that not only the Pruitts, but a number of other members of the Department, including defendant Stonesifer while he was sheriff, none of whom were punished, had engaged in the same conduct for which the Pruitts were fired. The Department, in its memoranda, contended that the reason for the Pruitts' dismissal was not race or sex, but their allegedly culpable conduct (the alleged "Nazi-like" activity, which the Pruitts explained in their amended complaint was a joke, intended as a parody on a former television program called "Hogan's Heroes" having to do with a German POW camp during World War II), arguing, despite former Sheriff

Stonesifer's complicity in that conduct, that the Pruitts were punished, while the other participants were not, because the Pruitts were the only supervisory members of the Department who engaged in the improper conduct. (Both the district court and the court of appeals accepted that contention.)

The case proceeded to the court of appeals. Neither party's brief addressed any summary judgment issue. The arguments presented centered instead on the Rule 12(b)(6) disposition by the district court. The court of appeals, in affirming the district court's judgment, rested its decision, for the first time in the case, on a summary judgment basis, stating in the final sentence of its opinion, "Accordingly, entry of summary judgment for the Howard County Sheriff's Department is justified and the order of the district court dismissing the case is AFFIRMED." (App. 18; slip opinion at 7).

REASONS FOR ALLOWING THE WRIT

The Pruitts respectfully submit that certiorari should be granted in this case because the court of appeals, in deciding the case as it did, based upon its finding that the Department was entitled to summary judgment and that hence the district court judgment dismissing the Pruitts' complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, despite that summary judgment was not ruled on in the district court and was not an issue presented to or addressed by the parties in the court of appeals, has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. And the problem, if the circuit court's decision is permitted to stand, is a very pervasive one since it potentially can affect every or any

litigated matter, apparently whether or not summary judgment is even sought by a party, since the circuit court, in reaching the summary judgment premise upon which it rested its disposition of this case, apparently acted sua sponte and certainly without any disposition by summary judgment in the district court or any briefing, argument or request at the appellate level by either side for relief in the form of summary judgment.

The Pruitts submit that it is quite apparent from the record that the district court did not reach its decision on any summary judgment basis, the district judge having noted in part in his Memorandum: "Judge Goetz's report and Recommendation will be accepted and Defendant's Motion, being treated as one for dismissal, will be granted." (App. 21); emphasis added); "In his Report and recommendation, Judge Goetz treated

Defendants' alternatively framed Motion as being one filed for dismissal pursuant to Fed. R. Civ. P. 12(b)(6)." (App. 22; emphasis added); "Accordingly, Defendants' Motion to Dismiss will be granted," (App. 28; emphasis added. The district court's order accompanying its Memorandum also made clear that it was a Rule 12(b)(6) motion with which the court was dealing, the order clearly noting in part, "That Defendants' Motion to Dismiss Amended Complaint, or in the Alternative, for Summary Judgment, said Motion being treated as one for dismissal, is GRANTED" (App. 30; emphasis added).

It seems clear that the district court did not decide any summary judgment issue, but nevertheless the court of appeals did. Federal appellate courts are not supposed to decide issues not decided in lower tribunals. See, e.g., Singleton v. Wulff. 428 U.S. 106, 96

S.Ct. 2868, 49 L.Ed.2d 826 (1976). There two Missouri-licensed physicians challenged a Missouri statute excluding abortions which were not "medically indicated" from procedures for which medicaid benefits were available to needy persons. A three-judge district court dismissed the relevant count of the complaint for lack of standing and the plaintiffs appealed. The court of appeals reversed, but also decided the merits of the case and held the statute to be unconstitutional. This Court granted certiorari and held for the plaintiffs on the standing issue, but also held that the court of appeals should not have decided the merits of the case since petitioner, who had not filed any pleading addressed to the merits, had had no opportunity to present his position in support of the statute. In so doing, the Court remarked:

> "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In Harmel v. Helvering, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 83 L.Ed. 1037 (1941), the Court explained that this is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that the litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence. Moreover, even assuming there is no such evidence, petitioner should have the opportunity to present whatever legal arguments he may have in defense of the statute. We think he was justified in not presenting those arguments in the Court of Appeals, and in assuming, rather, that he would at least be allowed to answer the complaint, should the Court of Appeals reinstate it,"

(96 S.Ct. at 2877).

The principle enunciated in Singleton would seem to be applicable with equal force to the instant case. The Pruitts approached the court of appeals on notice

to argue - and did argue - Rule 12(b)(6) issues, because those were the issues decided by the district court, presented by the briefs and with respect to which they were on notice, only to be surprised by a decision premised upon summary judgment considerations, as to which they had not presented appellate argument, because summary judgment was not an issue in the case on appeal. They thus were, they submit, deprived of both notice and an opportunity to be heard on what proved to be the dispositive issue in the appellate court. Thereby, they submit, they were denied fair play, i.e. due process.

Fundamental requisites of due process are notice and an opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). (While those cases dealt with due process

considerations in the context of the 14th Amendment, the same principle, the Pruitts suggest, is just as apposite with respect to 5th Amendment due process guarantees.) The fact, apparent from the record, is that the Pruitts in the instant case were afforded neither notice that the critical issue (or any issue) in their appeal was to be whether the Department was entitled to summary judgment, rather than whether their complaint sufficiently stated a cause of action, nor any opportunity to present argument on that point, which proved to be the basis for an appellate decision adverse to them. They thus were denied fundamental due process rights of overriding importance, a situation which in our system of justice should not be permitted to remain unremedied, even when it affects but a single citizen. much less, when, as here, it potentially

exposes any citizen engaged in civil litigation to the prospect of adverse judicial action without either notice or an opportunity to be heard. The decision of the court of appeals in this case, if allowed to stand, certainly can be taken as precedent to that effect. This Court should exercise its supervisory power to rectify a patently unacceptable situation which in this case already has grievously affected the Pruitts, for which they should be afforded a remedy, and which can affect every other civil litigant.

CONCLUSION

For the reasons set out herein, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BENJAMIN LIPSITZ,
Counsel of Record
for Petitioners

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
for the Fourth Circuit

DONALD L. PRUITT, DENNIS L. PRUITT, Plaintiffs-Appellants, v. HOWARD COUNTY SHERIFF'S DEPARTMENT, MICHAEL A. CHIUCHIOLO, SHERIFF. HOWARD COUNTY, HERBERT STONESIFER, Defendants-Appellees.	:	No.95-1193

Appeal from the United States District Court for the District of Maryland. at Baltimore. Edward S. Northrop, Senior District Judge.
(CA-92-3550-N; CA-02-3551-N)

Argued: September 29, 1995

Decided: January 31, 1996

Before ERVIN, Chief Judge, and MURNAGHAN and WILKINS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Benjamin Lipsitz, Baltimore, Maryland, for Appellants. Mark Holdsworth Bowen, Assistant Attorney General, MARYLAND STATE POLICE HEADQUARTERS, Pikesville, Maryland, for

Appellees. ON BRIEF: J. Joseph Curran, Jr., Attorney General of Maryland, MARYLAND STATE POLICE HEADQUARTERS, Pikesville, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM;

Donald L. Pruitt and Dennis L. Pruitt challenge the district court's dismissal of their discrimination suit against their former employer, the Howard County, Maryland, Sheriff's Department. The Pruitts allege that the Department discharged them from their supervisory

positions because of their race and/or sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. [sec.] 2000e et seq., and of 42 U.S.C. [secs.] 1981 and 1983. Because the Pruitts have failed to submit evidence of discrimination creating a genuine issue of material fact, we affirm the district court's dismissal of the Pruitts' action.

I.

The Pruitts are white twin brothers who were employed by the Howard County, Maryland, Sheriff's Department from 1982 until their termination in 1991. At the time of their discharge, Donald Pruitt held the rank of major and served as Chief Deputy - second in command of the Department and supervisor of all aspects of its operation. Dennis Pruitt held the rank of sergeant, serving as departmental internal affairs office and supervising the deputies assigned to road work.

In August 1990, during the administration of Defendant Sheriff Herbert Stonesifer, the Pruitts were charged with conduct unbecoming officers, failure to obey the order of a supervisor, and willful disobedience of an order. The charges were based on the Pruitts' alleged

"Nazi-like" conduct while on duty, including clicking heels, giving Nazi salutes, and uttering German expressions and commands, such as "Achtung," "Sieg" and "Heil". Apparently, the Pruitts' behavior was intended as a joke, imitating the television situation comedy "Hogan's Heroes." which parodied German officers guarding American POWs during World War II. The Pruitts continued this hilarity on a daily basis for a period of about ten years.

After an evidentiary proceeding, the Law Enforcement Officers Bill of Rights ("LEOBR") Hearing Board found both Pruitts guilty of one count of conduct unbecoming an officer, dismissed all other charges, and recommended that they each be demoted one grade in rank, fined $200, and required to attend sensitivity training. Defendant Michael A. Chiuchiolo, who replaced Stonesifer as Sheriff on December 3, 1990, rejected the board's recommendation and instead terminated both of the Pruitts effective February 6, 1991.

The Pruitts appealed sheriff Chiuchiolo's decision to the Circuit Court for Anne Arundel County, Maryland, alleging violations of their First Amendment, equal protection and due process rights, and of their rights under the LEOBR. The circuit court resolved all issues in favor of the Department.

The Pruitts then appealed to the Maryland Court of Special Appeals, which affirmed the circuit court decision. Pruitt v. Howard County Sheriff's Department, 623 A.2d 696, 704 (Md. Ct. Spec. App. 1993).

On December 18, 1992, the Pruitts filed two (subsequently consolidated) complaints in the District of Maryland, alleging that they were discharged based on their race and/or their sex and seeking damages under Title VII and under 42 U.S.C. [secs.] 1981 and 1983. The suit named as defendants the Howard County Sheriff's Department, Sheriff Chiuchiolo, and former Sheriff Stonesifer (collectively "the Department"). The Pruitts did not deny their misconduct, but alleged that they were singled out for punishment because they are white men. In support of their claim, the Pruitts alleged that, while other Department members - including a black male deputy

sheriff, a white female deputy sheriff, and "a number of" white male deputy sheriffs - engaged in the same behavior, the Pruitts were the only employees who were disciplined. No members of the Department other than the

Pruitts were investigated, charged, or punished in connection with the alleged misconduct.

The Department moved to dismiss the Pruitts' amended complaint and, in the alternative, for summary judgment. The district court dismissed the case under Fed. R. Civ. P. 12(b)(6), finding that the Pruitts had failed to state a prima facie case of racial or sex-based discrimination. Because most of those who purportedly engaged in the same misconduct and were not punished were of

the same race and gender as plaintiffs, the court fund that the Pruitts' own allegations refuted their discrimination claim. The Pruitts timely filed a joint notice of appeal on January 23, 1995.

II

A plaintiff who alleges discriminatory discharge in violation of Title VII must prove that, but for his or her race or sex, the employer would not have taken the adverse employment action. Because the Pruitts offer no direct evidence of Howard County's intent to discriminate against them, they rely on circumstantial evidence under the three-step proof scheme developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the familiar McDonnell Douglas paradigm, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of unlawful discrimination, which creates a

rebuttable presumption. St. Mary's Honor Center v. Hicks, _____ U.S. _____. 125 L.Ed.2d 407, 415 (1993) (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-253 (1981)). Next, the defendant may rebut the presumption by articulating a legitimate, nondiscriminatory reason for its actions. Id. at 416. Once the defendant has offered a legitimate explanation, the presumption of discrimination drops away, and the plaintiff must prove that the employer's proffered reason is pretextual and the adverse employment action was actually taken because of race or sex. Id. Throughout the process, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Burdine 450 U.S. at 253. Although the McDonnell Douglas structure

was developed to assist trial judges in evaluating evidence produced at trial, we have applied this three-step proof scheme to summary judgment proceedings. See, e.g., Mitchell v. Data Gen, Corp., 12 F.3d 1310, 1315-16 (4th Cir. 1993) (applying

McDonnell Douglas framework to an age discrimination claim at the summary judgment stage).

The district court found that the Pruitts failed to meet their initial burden of establishing a prima facie case of discrimination. In disparate treatment cases, a plaintiff may make out a prima facie case by proffering direct evidence of discrimination or indirect evidence "whose cumulative probative force, apart from the presumption's

operation, would suffice under the controlling standard to support as a reasonable probability the inference that but for the plaintiff's race [or sex]," the defendant would not have taken the adverse employment action. Holmes v. Bevilacqua, 794 F.2d 142, 146 (4th Cir. 1986). In the absence of such evidence - as in the case here - a plaintiff must resort to the McDonnell Douglas presumption framework "with all of its ensuing complexities." Id.

In McDonnell Douglas, a discriminatory hiring case, the Supreme Court held that in order to establish a prima facie case of discrimination, the plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to

> seek applications from persons of complainant's qualifications.

411 U.S. at 802. The Court noted, however, that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [the plaintiff] is not necessarily applicable in every respect to differing factual situations." Id. at 802 n.13. Accordingly, courts have modified the McDonnell Douglas formulation to address a wide range of discrimination claims. See. e.g., Holmes 794 F.2d at 146. In disparate discipline cases, the Fourth Circuit has held that in order to establish a prima facie case of discriminatory enforcement, a plaintiff must show

> (1) that he is a member of the class protected by Title VII, (2) that the prohibited conduct in which he engaged was comparable in seriousness to misconduct of employees out-

> side the protected class, and (3) that the disciplinary measures enforced against him were more severe than those enforced against those other employees.

Cook v. CSX Transp. Corp., 988 F.2d 507, 511 (4th Cir. 1993); see also Moore v. City of Charlotte, NC., 754 F.2d 1100, 1105-06 (4th Cir.), cert. denied. 472 U.S. 1021 (1975).

In granting the Department's motion under Rule 12(b)(6), the district court concluded that the face of the Pruitts' complaint did not state a prima facie claim of discrimination. Indeed, the district court found that the Pruitts' own allegations undercut any inference of discrimination because most of the employees who allegedly participated in the same misconduct and were not punished were also white men. Accordingly, the district court dismissed the case. We do

not reach the question of whether this basis for decision was correct because we find that dismissal was clearly warranted on summary judgment grounds.

Summary judgment is proper only when the nonmoving party has placed no genuine issue of material fact before the court and the movant is entitled to a judgment as a matter of law. Fed, R. Civ. Proc. 56(c). The court must assess the evidence and draw all permissible inferences in the nonmovant's favor. Matsushita Elec. Indus. Co. v. Zenith radio Corp., 475 U.S. 574, 587 (1986). The nonmovant must nevertheless make a sufficient evidentiary showing on each element of his claim such that a jury could reasonably find in his favor. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Rule 56 provides an important mechanism for avoiding a wasteful trial which would be of no use

in disposing of the case. Id. at 327.

Under the McDonnell Douglas scheme, a defendant may rebut a prima facie case of discrimination by presenting a legitimate nondiscriminatory reason for its actions. Hicks, 125 L.Ed.2d at 416. In its motion to dismiss or for summary judgment, Howard County alleged that the Pruitts were discharged because they held high supervisory positions in the Department. By initiating the inappropriate behavior and refusing to obey orders to stop, the Pruitts' deportment condoned and fostered misconduct by their subordinates. No other deputy - white, black, male or female - who supposedly participated in the

"Nazi-like" behavior occupied a position

of authority in the Department. Because the Department articulated a legitimate, nondiscriminatory reason for its action, the burden shifted back to the Pruitts to respond to the motion for summary judgment by proffering evidence from which a reasonable jury could conclude both that the Department's explanation was pretextual and that the dismissal was actually motivated by the Pruitts' race or sex.

The Pruitts submitted no evidence at all to impugn the Department's explanation. They presented no evidence, for example, of prior remarks or actions by the Department suggesting either a general pattern of discrimination against white male employees or discriminatory intent toward the Pruitts in particular. Indeed, the Pruitts own allegation that "a number of" white male deputies were not disciplined for the same misconduct

supports the Department's contention that the Pruitts were treated more harshly not because of their race or sex, but because they occupied leadership positions. See Hughes v. Bedsole, 48 F.3d 1376, 1384-85 (4th Cir. 1995 (finding no genuine issue of material fact regarding whether employer's reasons were pretextual where female plaintiff's evidence that a male employee was not disciplined for comparable conduct was undercut by evidence that another female employee was also treated more leniently that plaintiff). In the absence of any allegation rebutting the Department's nondiscriminatory explanation, no reasonable trier of fact could conclude that discrimination was more likely than not a motivating factor in firing the Pruitts. The Pruitts cannot rely on conclusory allegations to create a factual dispute warranting a trial.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1966). Accordingly, entry of summary judgment for the Howard County Sheriff's Department is justified and the order of the district court dismissing the case is

AFFIRMED.

Filed: February 12, 1996

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-1193

Donald L. Pruitt, et al,

Plaintiffs - Appellants,

versus

Howard County Sheriff's Department, et al.

Defendants - Appellees.

O R D E R

The Court amends its opinion filed January 31, 1996, as follows:

On page 2, first full paragraph, line 6 -- the extra comma is deleted after the phrase "et seq."

On page 4, first full paragraph, line 2 -- the word "judgement" is corrected to read "judgment."

For the Court - By Direction

/s/ Bert M. Montague

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DONALD L. PRUITT	:	
	:	CIVIL ACTION
v.	:	NO. N-92-3550
	:	
HOWARD COUNTY SHERIFF'S DEPARTMENT, ET AL..	:	
	:	
DONALD L. PRUITT	:	
	:	CIVIL ACTION
v.	:	NO. N-92-3551
	:	
HOWARD COUNTY SHERIFF'S DEPARTMENT, ET AL.	:	

MEMORANDUM

I. INTRODUCTION

Presently pending before the Court for consideration is Defendants' Motion to Dismiss Amended Complaint or, in the Alternative. for Summary judgment and Plaintiffs' Response thereto. On May 18, 1994, Defendants' Motion was referred to Chief Magistrate Judge Clarence E. Goetz for Report and recommendation pursuant to 28 U.S.C. [sec.] 636 and Local Rule 301. Judge Goetz issued his report and

Recommendation on October 31, 1994 to which Plaintiffs have filed a timely objection. The Court has reviewed these papers, together with the underlying record, on a de novo basis. For the reasons set forth below, Judge Goetz's Report and recommendation will be adopted and Defendant's Motion, being treated as one for dismissal, will be granted.

II. FACTS AND PROCEDURE

Plaintiffs' consolidated Complaints were filed on or about December 18, 1992 and amended on November 15, 1993. Plaintiff are white males who were employed by the Defendants Howard County Sheriff's Department ("Sheriff's Department") for a period of time beginning in 1982 and ending February 6, 1991. Plaintiffs claim that Defendants discriminated against them when Plaintiffs were discharged for conduct unbecoming a member of the Sheriff's

Department /1 and other employees who engaged in the same behavior were not terminated or similarly punished. Plaintiffs claim that they were discharged because of their race, sex and/or certain political considerations held by Defendant Sheriff Chiuchiolo. Their Amended Complaint claims that Defendants' alleged disparate treatment of them violates Title VII, 42 U.S.C. [secs.] 1981 and 1983.

In his Report and Recommendation, Judge Goetz treated Defendants' alternatively framed Motion as being one filed for dismissal pursuant to Fed. R. Civ. P. 12(b)(6). He found that Plaintiffs' Amended Complaint fails to state a claim upon which relief can be

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/1 Such behavior included gestures involving Nazi salutes, the clicking of heels and usage of German language commands or expressions. See Amended Complaint at [paragraph] 16.

granted because Plaintiffs fail to allege a prima facie case of either racial or sex discrimination. More specifically, Judge Goetz held that Plaintiff's own allegations demonstrate that the basis for their termination was not one or race or gender in that "a majority of the universe of unpunished parties is of the same gender and race as the punished parties." Report and Recommendation at 3. Judge Goetz also held that Plaintiffs' claims under [sec.] 1981 were not cognizable under that statute and that their [sec.] 1983 claim failed in that it was grounded in Plaintiffs' other federal claims. Finally, he noted that Plaintiffs could not prevail on a disparate impact theory because they were the only members of a "majority" group to be punished for their behavior.

Plaintiffs essentially object to each of these findings. They note Judge

Goetz's reliance on the Supreme Court's holding in McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). They then contend that they should be allowed to produce evidence showing that they were the only white male supervisory employees who were punished. Plaintiffs also argue that Judge Goetz's reliance upon the case of Williams v. First Union National Bank' 920 F.2d 232 (4th Cir. 1990), cert. denied. 500 U.S. 953 (1991), is misplaced and contend that Judge Goetz erred in recommending dismissal of their [sec.] 1983 claim.

III. DISCUSSION

Under Fed. R. Civ. P. 72(b), this Court is required to make a de novo review of this case on the record and then accept, reject or modify the Magistrate Judge's report and Recommendation, as needed. See generally United States v. George, 971 F.2d 1113 (4th Cir.

1992). The Court will consider Plaintiffs' objections seriatim.

Although Plaintiffs clearly understand that Judge Goetz considered their Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), their first argument relates to evidentiary matters, i.e.. issues more appropriately addressed under summary judgment. Plaintiffs argue that evidence to be adduced by them at trial would show that the Defendant Sheriff's Department employed 24 deputies, "of whom 7 were members of minorities, 3 being female [one of whom was black] and 5 being black [1 of whom was female] . . ." Objections at 4. They assert that these facts are also evident from the papers already filed herein. Id. In sum, Plaintiffs argue that they should not de denied an opportunity to produce proof of the claims made in their Amended Complaint.

A review of Plaintiffs' Amended

Complaint, however, finds that these allegations are not made by Plaintiffs therein. Moreover, it is clearly established as a matter of law that under Rule 12(b)(6), Plaintiffs will be unable to reach trial on the merits if their claims fail to state a viable cause of action. See, e.g., Conley v. Gibson, 355 U.S. 41 (1957). Although Plaintiffs argue that they should not be precluded from having the opportunity to prove their case, they simply have not alleged facts showing that as a matter of law that they were discriminated against in [sic] the basis of race or sex. Instead, their Amended Complaint reveals that they were terminated for behavior, but other similarly situated White men were not punished. As such, neither this Court nor Defendants, are summarily depriving Plaintiffs of their requested forum. To the contrary, Plaintiffs themselves have

failed to allege sufficient facts showing that they are entitled to be heard under the law. /2

Plaintiffs also address Judge Goetz's reliance upon the holding in Williams with respect to the reach of [sec.] 1981. They correctly contend that the scope of [sec.] 1981 has been enlarged since the issuance of the Williams case. The Court need not address this issue, however, because Plaintiffs fail to allege facts showing a prima facie case of discrimination. Moreover, the same conclusion can be made with respect to Plaintiffs' [sec.] 1983 claim.

/2 Alternatively, the Court notes that even were Plaintiffs to present allegations or evidence showing themselves to be the only white male supervisory employees punished, this showing alone does nothing to establish discrimination on the basis of race or gender. Instead it suggests that Plaintiffs' behavior was of particular concern to Defendants because of their supervisory responsibilities.

IV. CONCLUSION

Based upon a de novo review of the record and for the reasons set forth above, the Court finds there is good cause to adopt the October 31, 1994 Report and Recommendation of Chief Magistrate Judge Goetz. Accordingly, Defendants' Motion to Dismiss will be granted. A separate Order shall enter

22nd Dec. 1994 (Date)

/s/ Edward s. Northrop
/t/ EDWARD S. NORTHROP
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DONALD L. PRUITT	:	
	:	CIVIL ACTION
v.	:	NO. N-92-3550
	:	
HOWARD COUNTY SHERIFF'S DEPARTMENT, ET AL..	:	
	:	
DONALD L. PRUITT	:	
	:	CIVIL ACTION
v.	:	NO. N-92-3551
	:	
HOWARD COUNTY SHERIFF'S DEPARTMENT, ET AL.	:	

O R D E R

The Court having given de novo review to the October 31, 1994 Report and recommendation of Chief Magistrate Judge Goetz, together with the underlying record and Plaintiffs' Objections, IT IS THIS 22nd day of December, 1994, by the United states District Court for the District of Maryland hereby ORDERED:

1. That the October 31, 1994 Report and Recommendation of Chief Magistrate Goetz is ADOPTED;

2. That Defendants' Motion to dismiss

Amended Complaint, or in the Alternative, for Summary Judgment, said Motion being treated as one for dismissal, is GRANTED and Plaintiffs' Amended Complaint is DISMISSED;

3. That these cases are CLOSED; and

4. That the Clerk shall mail copies of this Order, together with the foregoing Memorandum, to all parties of record.

/S/ Edward S. Northrop
/t/ EDWARD S. NORHROP
Senior United states
District Judge

Filed October 31, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DONALD L. PRUITT	:	
	:	CIVIL ACTION
v.	:	NO. N=92-3550
	:	
HOWARD COUNTY SHERIFF'S DEPARTMENT, ET AL..	:	
	:	
DONALD L. PRUITT	:	
	:	CIVIL ACTION
v.	:	NO. N-92-3551
	:	
HOWARD COUNTY SHERIFF'S DEPARTMENT, ET AL.	:	

REPORT AND RECOMMENDATION

Pending before the Court is a Motion to Dismiss Amended Complaint or, in the Alternative, for Summary Judgment. (Paper No. 18).

Plaintiffs in these consolidated cases initially filed pro se complaints on forms provided by the Court alleging employment discrimination. The Court, in a memorandum issued October 18, 1993, denied without prejudice a motion similar to the instant motion to dismiss from the

defendants and the plaintiffs were given an opportunity to amend the complaints, after which defendants would be free to renew their motions to dismiss. (Paper No. 12).

Plaintiffs now have filed an amended complaint (Paper No. 14) and the defendants have moved to dismiss or, in the alternative, for summary judgment. (Paper No. 18).

The following alleged facts, from the face of the amended complaint, are taken as true upon consideration of the motion to dismiss. Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740 (1976). The plaintiffs (twin brothers) are white males who were fired from their supervisory positions in the Howard County Sheriff's Department in February of 1991. The plaintiffs were charged administratively in 1990 with conduct unbecoming members of the

department based upon alleged Nazi-like activities, i.e., giving and receiving Nazi salutes, clicking of heels, and employing German language commands. Other members of the department, including a black male deputy sheriff, a white female deputy sheriff, and "a number" of white male deputy sheriffs engaged in the same activity. Plaintiffs, however, were the only employees who were punished because of the alleged conduct.

Plaintiffs claim that they were discharged because of their race and/or their sex and/or certain political motives of the sheriff in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. [sec.] 2000e et seq., as well as 42 U.S.C. [secs.] 1981 and 1983.

Defendants assert in their motion to dismiss that plaintiffs fail to allege sufficient facts to state a claim. Such

motions generally are viewed unfavorably and are granted only if it appears beyond a doubt that the plaintiffs can prove no set of facts which would entitle them to relief. Conley v. Gibson, 355 U.S. 41 (1957); Rogers v. Jefferson-Pilot Life Insurance Co., 883 F.2d 324 (4th Cir. 1989). This appears to be such a case, however.

The instant case bears interesting similarities to McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). In McDonald, two white employees of the defendant were fired for misappropriating property, while a black employee similarly charged was not dismissed. The court held that Title VII prohibits discrimination against the white petitioners in that case on the same standards that would be applicable were they black and their co-worker white. The striking difference between that case and the

instant case is that in McDonald the universe of unpunished parties was of a different race than that of the punished parties, whereas in the instant case, a majority of the universe of unpunished parties is of the same gender and race as the punished parties. This is not a case wherein the plaintiffs have not said enough in their complaint but rather one in which they have said too much. While the plaintiffs herein may have been singled out for punishment, it is clear from the face of their complaint that the basis of that singling out process could not have been race or gender, inasmuch as most of those who purportedly engaged in the same conduct and were not punished were the same race and gender as plaintiffs. The allegations of the complaint militate against, rather than in favor of, a case of discrimination. See Hicks v. Southern Maryland Health

Systems agency, 737 F.2d 399 (4th Cir. 1984). /1 In fact, accepting plaintiffs' allegations of fact as true leads inexorably to the conclusion that plaintiffs cannot establish a prima facie case of discrimination on the basis of race or sex, whether through direct or indirect evidence, or, in the alternative, by showing inter alia background circumstances which would support the belief that the defendant is "that unusual employer who discriminates against the majority." Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012 (D.C.Cir. 1981); see also Notari v. Denver Water Dept., 971 F.2d 585 (10th

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/1 The cases cited by plaintiffs in their response regarding disparate impact theory (at page 5) simply are inapposite. This cannot be a disparate impact case, involving facially neutral employment practices which fall more harshly on one group than another, since, according to their own pleadings, the plaintiffs were the only members of the majority to

suffer from the complained of treatment. Cir. 1992).

As to plaintiffs' claim under 42 U.S.C. [sec.] 1981, claims of discriminatory discharge are not cognizable under that statute. Williams v. First Union Nat'l Bank, 920 F.2d 232 (4th Cir. 1990). Plaintiffs' claim under 42 U.S.C. [sec.] 1993 is grounded in purported violations of Title VII and [sec.] 1981 and will not lie for the reasons set forth heretofore.

Accordingly, it is recommended that defendants' motion to dismiss be granted.

Dated October 27, 1994

/s/ Clarence E. Goetz
/t/ Clarence E. Goetz
Chief U. S. Magistrate Judge